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MBf Finance Bhd v Low Achee & Anor

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–374 OF 2002
SUPANG LIAN JC
18 JUNE 2010

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Contract — Guarantee — Liability of guarantor — Whether second defendant signed guarantee and indemnity agreement as guarantor of hire purchase loan facility obtained by first defendant — Whether second defendant liable for indebtedness arising from guarantee

D

Evidence — Burden of proof — Person who alleged fact had to prove it — Signature on guarantee — Whether plaintiff discharged burden of proving that second defendant signed guarantee

E

Evidence — Expert evidence — Signature on guarantee — Whether handwriting on guarantee was that of second defendant's — Whether plaintiff could challenge truth of content of expert's report when it formed part of agreed bundle of documents — Whether there was credible challenge of probative value of expert's report by plaintiff

F

When the first defendant, purchased a hydraulic excavator from Wearma Heavy Machinery Sdn Bhd ('Wearma'), the purchase was financed by the plaintiff, which is now known as AmBank (M) Bhd. The financing was effected by a hire purchase agreement signed by the first defendant and a guarantee and
G indemnity agreement ('the guarantee') to secure the hire purchase loan facility, which was signed by one Aundre Kok Oon. When the first defendant defaulted in paying the monthly payments due under the hire purchase agreement, the plaintiff issued a notice of demand on the first defendant and Aundre Kok Onn ('the second defendant'), an advocate and solicitor, for guaranteeing the
H liability of the first defendant under the hire purchase agreement. The full name of the guarantor, as stated in the guarantee, was Aundre Kok Oon but the plaintiff alleged that the second defendant was the guarantor who signed the guarantee. When the defendants failed to comply with the demand the plaintiff instituted the present action against both of them. The plaintiff's
I claim was for the sum of RM394,142.34, which was the amount outstanding under the hire purchase agreement, interest and costs. The second defendant denied any knowledge of the hire purchase agreement or the guarantee. It was his defence that he had not signed the guarantee, that the signature on it was not his own and that as a result he was not indebted to the plaintiff for the

amount claimed in the writ. At the trial the plaintiff could only proceed against the second defendant because the writ was not served on the first defendant. The plaintiff's witness, a director of Wearma ('PW2') was to provide direct evidence of the signing of the guarantee by the second defendant. He testified that the second defendant had signed the guarantee in his presence at the office of Wearma in Kulai, Johor but he could not recognise or remember the face of the guarantor who allegedly signed before him because the incident took place some 12 years ago. In response to PW2's assertion that the guarantee was executed before him at Kulai, the second defendant testified that he had never met PW2 until that day and that he could not have met PW2 in Kulai on the date of the execution of the guarantee because he had attended to two cases in the Kuala Lumpur courts on the date in question. The plaintiff also adduced evidence that the second defendant had extended documents such as his annual practising certificate and his client's account statement to it for the purpose of supporting the first defendant's loan application but the second defendant explained that he had forwarded the two documents to the plaintiff to apply for panelship. The second defendant also gave undisputed evidence that after receiving the plaintiff's notice of demand he wrote to the plaintiff requesting that the signature on the guarantee should be analysed by an expert. However, the plaintiff only embarked on this course of action much later. The document examiner from the Department of Chemistry, Malaysia ('the expert'), stated in her report ('the expert's report') that on comparison she found the questioned signature of the guarantee to show differences in handwriting characteristics from the specimen signatures of the second defendant. The plaintiff challenged the truth of the expert's report, a document that formed part of the agreed bundle of documents, and submitted that the expert witness' report was not conclusive because the document examiner had formed her opinion on the authenticity of the signature on the guarantee without making comparisons with any contemporaneous signature of the second defendant.

Held, dismissing the claim against the second defendant with costs:

(1) In the present case the name of the guarantor stated on the guarantee was Aundre Kok Oon with an employer stated as Oon & Partner. This meant that the guarantor named on the guarantee was not the second defendant, Aundre Kok Onn. It was elementary that the party who asserts the existence of the facts must prove the existence of those facts and it was thus incumbent on the plaintiff to prove that the second defendant signed the guarantee. Although it was the plaintiff's case that PW2 was the witness to the execution of the guarantee by the second defendant, PW2 was unable to positively identify the second defendant. It also came to light in the course of cross-examination that PW2 had not asked the person who signed the guarantee for any identification document such as his identity card at the time of its execution. In addition, the second defendant produced evidence which placed him at

A the Kuala Lumpur courts attending to two cases on the date of execution of the guarantee. The second defendant's evidence remained unshaken and was weightier than PW2's, who could not identify him. Thus, PW2's assertion in court that it was the second defendant who had signed the guarantee before him was simply without basis and a complete fallacy. Hence, the plaintiff had not discharged its burden of proving that the second defendant signed the guarantee (see paras 6, 9, & 11).

(2) In the present case, formal proof of the expert's report had been dispensed with because it was an admitted document in the agreed bundle, but the plaintiff had challenged the truth of the contents of that agreed document. The onus was therefore on the plaintiff to cross-examine the witnesses called for this purpose or to adduce evidence otherwise. Instead the plaintiff was suggesting that the second defendant should have called the maker of the expert's report to testify. The plaintiff had fallen into error in thinking so as the second defendant was under no such obligation. Further, cross-examination could not refer to the maker of the statement as formal proof of the document had been dispensed with. At the trial the plaintiff did not call any witnesses for the purpose of challenging the truth of the contents of the expert's report but instead cross-examined the second defendant on the subject matter. Hence, there was no credible challenge of the probative value of the expert's report (see paras 29–35).

(3) The plaintiff had not at any time submitted that the expert was not skilled in the science of identification of handwriting and the parties held out that the expert witness was an expert in determining whether the handwriting on the guarantee was that of the second defendant's. Thus the expert's opinion that the signature on the guarantee was not that of the second defendant's was accepted (see paras 37–38).

(4) The plaintiff had on balance succeeded in proving the service of the notice of demand on the second defendant and its loss as pleaded. However, since the plaintiff had failed to prove that the second defendant had signed the guarantee it followed that it had failed to prove the liability of the second defendant for any indebtedness arising from the guarantee agreement (see paras 40, 44, 46–47).

[Bahasa Malaysia summary

Apabila defendan pertama, membeli mesin pengorek hidraulik daripada Werma Heavy Machinery Sdn Bhd ('Werma'), pembelian itu telah dibiayai oleh plaintif, yang kini dikenali sebagai AmBank (M) Bhd. Pembiayaan itu dilaksanakan melalui perjanjian sewa beli yang ditandatangani oleh defendan pertama dan gerenti dan perjanjian indemniti ('gerenti tersebut') untuk memperoleh kemudahan pinjaman sewa beli, yang telah ditandatangani oleh Aundre Kok Oon. Apabila defendan pertama gagal membayar bayaran

bulanan yang perlu dibayar di bawah perjanjian sewa beli itu, plaintif telah mengeluarkan notis tuntutan ke atas defendan pertama dan Aundre Kok Onn ('defendan kedua'), seorang peguambela dan peguamcara, kerana menjamin liabiliti defendan pertama di bawah perjanjian sewa beli tersebut. Nama penuh penggerenti, sebagaimana dinyatakan dalam gerenti tersebut, adalah Aundre Kok Oon tetapi plaintif mengatakan bahawa defendan kedua adalah penggerenti yang menandatangani gerenti tersebut. Apabila defendan-defendan gagal mematuhi tuntutan plaintif telah memulakan tindakan ini terhadap mereka berdua. Tuntutan plaintif adalah untuk jumlah RM39,142.34 yang merupakan baki jumlah di bawah perjanjian sewa beli, faedah dan kos. Defendan kedua menafikan apa-apa pengetahuan tentang perjanjian sewa beli atau gerenti tersebut. Pembelaannya adalah bahawa dia tidak menandatangani gerenti tersebut, bahawa tandatangan di atasnya bukan miliknya dan bahawa akibat daripada itu dia tidak berhutang dengan plaintif untuk jumlah yang dituntut dalam writ itu. Semasa perbicaraan plaintif hanya dapat menuntut terhadap defendan kedua kerana writ itu tidak diserahkan ke atas defendan pertama. Saksi plaintif, pengarah Wearma ('PW2') sepatutnya memberikan keterangan langsung tentang penandatanganan gerenti tersebut oleh defendan kedua. Dia memberi keterangan bahawa defendan kedua telah menandatangani gerenti tersebut dalam kehadirannya di pejabat Wearma di Kulai, Johor tetapi dia tidak dapat mengenali atau mengecam wajah penggerenti yang dikatakan telah menurunkan tandatangan di hadapannya kerana kejadian itu berlaku kira-kira 12 tahun lalu. Sebagai jawapan kepada penegasan PW2 bahawa gerenti tersebut telah dilaksanakan di hadapannya di Kulai, defendan kedua telah memberi keterangan bahawa dia tidak pernah berjumpa PW2 sehingga hari tersebut dan bahawa dia tidak mungkin telah berjumpa PW2 di Kulai pada tarikh pelaksanaan gerenti tersebut kerana dia terpaksa menghadiri dua kes di mahkamah Kuala Lumpur pada tarikh yang dipersoalkan. Plaintif juga mengemukakan keterangan bahawa defendan kedua telah menyerahkan dokumen-dokumen seperti sijil amalan tahunannya dan penyata akaun anak guamnya kepadanya bagi tujuan menyokong permohonan pinjaman defendan pertama tetapi defendan kedua menjelaskan bahawa dia telah mengemukakan kedua-kedua dokumen tersebut kepada plaintif untuk memohon ahli panel. Defendan kedua juga telah memberikan keterangan yang tidak dipertikaikan bahawa selepas menerima notis tuntutan plaintif dia telah menulis kepada plaintif meminta agar tandatangan di atas gerenti tersebut wajar dianalisis oleh seorang pakar. Walau bagaimanapun, plaintif tidak mengambil tindakan sebegini dengan segera. Pemeriksa dokumen dari Jabatan Kimia, Malaysia ('pakar tersebut'), menyatakan dalam laporannya ('laporan pakar') bahawa secara perbandingan dia mendapati tandatangan gerenti tersebut yang dipersoalkan menunjukkan perbezaan dalam ciri-ciri penulisan tangan berdasarkan spesimen tandatangan defendan kedua. Plaintif mencabar kebenaran laporan pakar itu, dokumen yang membentuk sebahagian daripada ikatan dokumen, dan berhujah bahawa laporan saksi pakar bukan konklusif kerana pemeriksa dokumen telah

membentuk pendapatnya berdasarkan ketulenan tandatangan atas gerenti tersebut tanpa membuat perbandingan dengan mana-mana tandatangan semasa defendan kedua.

Diputuskan, menolak tuntutan terhadap defendan kedua dengan kos:

(1) Dalam kes ini nama penggerenti yang dinyatakan atas gerenti tersebut adalah Aundre Kok Oon dengan majikan yang dinyatakan sebagai Oon & Partner. Ini bermaksud bahawa penggerenti yang dinamakan atas gerenti tersebut bukan defendan kedua, Aundre Kok Onn. Adalah penting untuk pihak yang membuat penegasan tentang kewujudan fakta membuktikan bahawa defendan kedua yang menandatangani gerenti tersebut. Meskipun ia kes plaintif bahawa PW2 adalah saksi kepada pelaksanaan gerenti tersebut oleh defendan kedua, PW2 tidak dapat mengenal pasti defendan kedua secara positif. Adalah ditimbulkan semasa pemeriksaan balas dijalankan bahawa PW2 tidak menyoal individu yang menandatangani gerenti tersebut untuk apa-apa dokumen pengenalan yang menunjukkan dia di mahkamah Kuala Lumpur menghadiri dua kes pada tarikh pelaksanaan gerenti tersebut. Keterangan defendan kedua tidak goyah dan lebih kukuh daripada keterangan PW2, yang tidak dapat mengecamnya. Oleh itu, penegasan PW2 di mahkamah bahawa defendan kedualah yang telah menandatangani gerenti tersebut di hadapannya sememangnya tidak berasas dan satu salah anggapan. Justeru itu plaintif tidak melepaskan beban buktinya bahawa defendan kedua yang menandatangani gerenti tersebut (lihat perenggan 6, 9 & 11).

(2) Dalam kes ini, bukti formal laporan pakar telah diketepikan kerana ia adalah dokumen yang diterima dalam ikatan dokumen, tetapi plaintif telah mencabar kebenaran kandungan dokumen yang dipersetujui tersebut. Beban dengan itu terletak atas plaintif untuk memeriksa balas saksi-saksi yang dipanggil bagi tujuan ini atau untuk mengemukakan keterangan sebaliknya. Namun plaintif mencadangkan bahawa defendan kedua patut memanggil pembuat laporan pakar untuk memberi keterangan. Plaintif telah tersilap dalam memikirkan begitu kerana defendan kedua tidak mempunyai kewajipan berbuat begitu. Selanjutnya, pemeriksaan balas tidak boleh merujuk pembuat kenyataan sebagai bukti formal dokumen yang telah diketepikan itu. Semasa perbicaraan plaintif tidak memanggil mana-mana saksi bagi tujuan mencabar kebenaran kandungan laporan pakar tetapi sebaliknya telah memeriksa balas defendan kedua berhubung perkara tersebut. Justeru itu, tiada cabaran yang boleh dipercayai tentang nilai probatif laporan pakar itu (lihat perenggan 29–35).

(3) Plaintif tidak pada bila-bila masa berhujah bahawa pakar tersebut tidak mahir dalam kaedah pengecaman tulisan tangan dan pihak-pihak

memutuskan bahawa saksi pakar itu pakar dalam menentukan sama ada tulisan tangan atas gerenti tersebut adalah tulisan tangan defendan kedua. Oleh itu pendapat pakar bahawa tandatangan atas gerenti tersebut bukan tandatangan defendan kedua adalah diterima (lihat perenggan 37–38).

(4) Plaintif atas imbangan berjaya membuktikan penyampaian notis tuntutan ke atas defendan kedua dan kerugiannya seperti dipohon. Walau bagaimanapun, oleh kerana plaintif telah gagal membuktikan bahawa defendan kedua telah menandatangani gerenti tersebut dengan itu ia telah gagal membuktikan liabiliti defendan kedua untuk apa-apa keberhutangan yang timbul daripada perjanjian gerenti tersebut (lihat perenggan 40, 44, 46–47).]

Notes

For a case on signature, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1632.

For cases on liability of guarantor, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4097–4105.

For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 591–594.

Cases referred to

Dato' Mokhtar bin Hashim v PP [1983] 2 MLJ 232, FC (refd)

Jaafar Shaari (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor [2000] 4 MLJ 200; [1997] 4 CLJ 509, SC (refd)

Mohd Nazari Ab Majit v Tan Keo Hock & Anor [1999] 1 CLJ 601, HC (refd)

Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200; [2000] 4 CLJ 508, HC (refd)

Legislation referred to

Evidence Act 1950 ss 73(1), 101, 103

Shaifful Bahrin bin Mustafa (Shahinuddin & Ranjit) for the plaintiff.

HP Chuan (Aundre Kok Onn with him) (Onn & Partners) for the second defendant.

Supang Lian JC:

INTRODUCTION

[1] The proceedings in this case arose from a claim by the plaintiff against the first defendant as a hirer under a hire-purchase agreement of 26 August 1997 and the second defendant as a guarantor under a guarantee and indemnity

A agreement that guaranteed the liability of the first defendant under the hire-purchase agreement. At the trial, the plaintiff could only proceed against the second defendant because the writ was not served on the first defendant. An application by the plaintiff to extend the validity of the writ for service on the first defendant had been dismissed by the court earlier on. At the conclusion of the trial, I dismissed the claim of the plaintiff against the second defendant and I now give my reasons.

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THE FACTS

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[2] Mr Aundre Kok Onn, the second defendant, is an advocate and solicitor of the High Court in Malaya practising law under the legal firm of Onn & Partners. On previous occasions, Mr Low Achee, the first defendant, had been the client of the second defendant in litigation cases. The first defendant thereafter had purchased a Komatsu Hydraulic Excavator PC310LC5 from Wearma Heavy Machinery Sdn Bhd ('Wearma') and paid a deposit of RM62,000 towards the purchase price. The plaintiff company, which is now known as AmBank (M) Bhd, financed the balance of the purchase price amounting to RM248,000. The financing was effected by the hire-purchase agreement dated 26 August 1997 and tendered as exh P2 (pp 26–28 bundle B). As is usual in hire purchase transactions, there was the inevitable guarantee and indemnity agreement to secure the facility. In this case, it was tendered as P14 (p 29 bundle B) and it bears the same date as the hire-purchase agreement (P2). The full name of the guarantor stated therein is Aundre Kok Oon. It was the case for the plaintiff that the second defendant signed on P14 as the guarantor.

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THE CLAIM OF THE PLAINTIFF

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[3] According to the plaintiff, the first defendant in breach of his obligations under the hire-purchase agreement, defaulted in paying the monthly installments due. Consequently, the plaintiff issued a notice of demand of 20 March 2002 on the first defendant as well as the second defendant. The first and second defendants failed to comply with the demand of the plaintiff, hence, this action instituted against both of them. The claim of the plaintiff was for the sum of RM394,142.34 as at 7 March 2002 and interest on the sum of RM279,994 at the rate of 8% pa from date of judgment until full settlement and costs.

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THE DEFENCE OF THE SECOND DEFENDANT

[4] In resisting the claim the second defendant said that he had no knowledge of the hire-purchase agreement or the guarantee and indemnity agreement. Hence, he did not sign the guarantee and indemnity agreement and

the signature thereon is not his. Until the filing of his statement of defence in this case, he had never seen either the hire-purchase agreement or the guarantee and indemnity agreement. Further, he had never received nor was he served with a notice of demand dated 20 March 2002 as alleged by the plaintiff. As he never agreed to stand as guarantor for the first defendant, he was not indebted to the plaintiff for the amount claimed in the writ.

THE ISSUES FOR DETERMINATION

[5] The issues before the court were therefore as follows:

(a) whether the second defendant signed the guarantee and indemnity agreement (P14) as guarantor;

(b) If the second defendant signed the guarantee agreement whether he was served a demand; and

(c) whether the plaintiff has proved the indebtedness in the amount of RM394,142.34.

DID THE SECOND DEFENDANT SIGN THE GUARANTEE AND INDEMNITY AGREEMENT (P14)?

[6] It is elementary that the party who asserts the existence of facts upon which judgment should be given to him must prove the existence of those facts (see s 101, of the Evidence Act 1950). Further, s 103 of the Evidence Act provides that unless it is provided by any law that the burden of proof of a particular fact lies with a particular person, then the burden of proof lies with the person wishing the court to believe in the existence of that particular fact. By para 5 of the statement of claim the plaintiff pleaded that the second defendant signed the guarantee and indemnity agreement that is P14. The claim of the plaintiff against the second defendant is premised on this alleged signing by the second defendant of P14 as a guarantor of the hire-purchase agreement. It was therefore incumbent on the plaintiff to prove that the second defendant signed P14.

[7] The plaintiff proffered PW2 as the witness to the execution by the second defendant of P14. It was the case for the plaintiff that PW2's evidence was crucial as it constituted direct evidence of the signing of P14 by the second defendant. PW2 was a director of Wearma Heavy Machinery Sdn Bhd and represented the latter in the negotiations with the first defendant to purchase the excavator. In his witness statement he said that based on P14, which is dated 26 August 1997, he was the witness of the signature of the guarantor by the name of Aundre Kok Onn. He was sure that the guarantor had signed the guarantee before him because he had never witnessed any execution or signing

of any guarantee without the presence of the signatory. Although he could not remember the exact date of the signing of the guarantee as that was 12 years before, he remembered though that it was after the execution of the hire-purchase agreement (P2) at the plaintiff's branch at Pontian. Moreover, if he was not mistaken, the guarantor signed the guarantee before him at the office of Wearma Heavy Machinery at Lot 3556, Batu 23, Jalan Air Hitam, 81000 Kulai, Johor. However, he no longer could recognise or remember the face of Mr Aundre Kok Onn, the guarantor, considering that the guarantee was signed 12 years back.

[8] The second defendant on the other hand said in evidence that looking at P14 it is a guarantee of Aundre Kok Oon. The signature of the guarantor does not belong to him and he had not signed any guarantee in front of PW2. He said that the first time he ever saw PW2 was when the latter testified in court. In any event, he could not have signed the guarantee on 26 August 1997 as he had to attend cases in the Kuala Lumpur courts that day. He produced a page from his firm's litigation diary for 26 August 1997 (marked exh D4) which shows that he had two cases on that day under his care. Furthermore, he had never been to the office of Wearma Heavy Machinery Sdn Bhd and on the only occasion he had been to Kulai, it was a visit to the police station.

[9] We saw how PW2 had asserted that he was the witness to the signature of Aundre Kok Onn. This statement is clearly inaccurate because the name of the guarantor stated on P14 is Aundre Kok Oon with an employer stated as Oon & Partner. We know that the name of the second defendant is not Aundre Kok Oon and he does not practice with Oon & Partner. PW2 had never attempted to explain the discrepancy between the name that he gave in evidence and the name appearing on P14. Learned counsel for the plaintiff as well appeared to have just brushed it aside and moved on with the examination of PW2 as if the fact of PW2 having witnessed the signature of Aundre Kok Onn, the second defendant, on P14 was established through this suspect piece of evidence from PW2. We thereby had learned counsel for the plaintiff proceeding to ask the question of PW2 whether he could recognise or identify Mr Aundre Kok Onn, the said guarantor if he were present in court. In my opinion, this question was wrong as it was on the false premise that it had been established that Mr Aundre Kok Onn was the said guarantor when that was not the case at all. Be that as it may, we had the answer of PW2 to that question and crucially he said that he no longer could recognise or remember the face of Mr Aundre Kok Onn. In my view, since the guarantor named on P14 is not the second defendant, but PW2 said he witnessed the signature of the second defendant, it was essential that PW2 should have been able to positively identify the second defendant as the person that appeared before him and signed as Aundre Kok Oon on P14. This he was not able to.

[10] Having failed to identify the second defendant as the person that signed P14, PW2 should at least indicate to the court the steps that he took to ascertain that the person executing P14 before him was really the second defendant. Instead, we had him telling the court under cross-examination that he did not record the names of all those people whose signature he had witnessed and that he depended on his memory as to who had appeared before him to execute the guarantee. Further, he did not know who typed the particulars on P14 and worse still, he had never asked anything from a signatory before they signed a guarantee because in his own words, he trusted them. Implicit in the last statement from PW2 is that neither asked for nor checked any identification document, as for instance the identity card of the person that signed P14, at the time of its execution. Hence, he did not have documents before him and he had done absolutely nothing to verify or ascertain the identity of the person signing before him.

[11] The sum total of the evidence of PW2 was that he could not explain why, contrary to his evidence in court, the name of the guarantor on P14 is someone else's and not the second defendant's. Further, he could no longer recognise the second defendant or identify him as the person that had signed P14. To compound matters, he had never verified the identity of the person that had signed P14 before him which meant he was not in a position at all to say who signed the document before him. Under those circumstances, in my opinion, PW2's assertion in court that it was the second defendant that had signed P14 before him was simply without basis and a complete fallacy. I had no hesitation in rejecting his evidence for being wholly unreliable. The case for the plaintiff having been founded primarily on the direct evidence of PW2 which was found to be severely wanting, it did not lie in the mouth of the plaintiff to say that it had discharged its burden of proving that the second defendant signed P14.

[12] To bolster its case that the second defendant had signed P14, the plaintiff through PW1 introduced the application for hire purchase finance that is P3 in respect of the Komatsu excavator. PW1 was the credit officer at the plaintiff's Pontian branch on 26 August 1997 and had prepared P2 ('hire-purchase agreement') and P14 ('the guarantee and indemnity'). According to her, the hirer and the guarantor had submitted P3 before P2 was executed. She added that she recommended for the application to be approved and signed on P3 at the bottom to that effect.

[13] In this connection, the second defendant in his evidence admitted giving a copy of his annual practising certificate and a copy of his client's account to the plaintiff on a previous occasion to apply for panelship. He could not recall exactly how the plaintiff required him to give the documents and he did not make any formal application for panelship. Learned counsel for the

A plaintiff contended that it was highly improbable for any solicitor to extend documents such as his annual practising certificate and his client's account statement to the bank without there being a formal application for panelship having been made. According to counsel, the logical inference was that the second defendant had forwarded those documents to the plaintiff for the
B purpose of supporting the first defendant's loan application. It must therefore follow that the second defendant had agreed to be the guarantor of the first defendant in the hire-purchase facility and signed P3. The second defendant on the other hand maintained he never signed P3 and that the first time he ever saw this document was when the plaintiff produced it to be included in the
C agreed bundle of documents at the case management stage before the deputy registrar just before trial.

[14] In my opinion, as it was the plaintiff that would have the court believe
D that the second defendant had signed P3 as the prospective guarantor, it bore the burden of proof. Once again, I found the evidence for the plaintiff severely wanting. In the first place, the document does not speak for itself. This is because in the document itself, there is no indication that it was executed before witnesses. Furthermore, under the guarantor's particulars, the name of
E the prospective guarantor is Aundre Kok Oon and the name and address of the guarantor's employer is stated as Oon & Partner. We know that neither the name of the prospective guarantor nor the address as stated on P3 is that of the second defendant. PW1 had never bothered to explain the discrepancy. What we had from her is the rather vague assertion in her witness statement ('P1')
F that the application was made 'by the Hirer and guarantor'. She appeared not to have possessed the confidence to state outright that Aundre Kok Onn, the second defendant, signed P3. Thus, there was nothing in the evidence of PW1 to pin the second defendant with P3.

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[15] Instead, in court we had learned counsel for the plaintiff making the second defendant compare the signature of the prospective guarantor on P3 with the real specimen signatures of the second defendant found at pp 1–4 of bundle B. Learned counsel for the plaintiff put it to the second defendant that
H the signatures are similar. I could not have agreed more with the second defendant when he roundly rejected the comparison. Comparing for my self (and this is allowed by s 73(1) of the Evidence Act 1950) the signature of the prospective guarantor on P3 with the true specimen signatures of the second defendant found at pp 1–4 bundle B, I did not find the signature on P3 to be
I at all similar to those found at pp 1–4. In my opinion, the signature on P3 is markedly shorter than every one of the specimen signatures exhibited at pp 1–4. That being the case, in all probability the signature on P3 was not that of the second defendant's. The marked difference in the signature could only but fortify the case for the second defendant that he never signed P3.

[16] With regard the contention of the plaintiff that it was highly improbable for the second defendant as a solicitor to have given his annual practising certificate to the plaintiff without there being a formal application made for panelship, I did not quite agree. The second defendant was steadfast that was what he did and I had no reason to doubt him on this. His practising certificate is personal to him and if he saw it fit to extend a copy to the plaintiff to support his application for panelship, although not made formally, that was entirely up to him. We all know that to be in the panel of established financial institutions or corporations is of importance to legal firms as that is where the bulk of the practice comes from. As far as I was concerned, I found nothing inherently untoward for the second defendant to have extended a copy of his practising certificate in that manner for such a purpose.

[17] In any event, if as contended by learned counsel for the plaintiff, the second defendant had given his annual practising certificate ('P4') to the plaintiff to support the application of the first defendant for the loan, it did not make sense that the name of the second defendant should not have appeared on both P3 and P14. This is because the name of the second defendant is stated clearly on P4 as Aundre Kok Onn. PW1 herself stated in evidence that she signed on P3 to recommend the application for approval. If P4 was submitted to the plaintiff to support the application for the loan, there was no reason for PW1 not to have spotted the different name that was written on P3 before she signed it. PW1 as well prepared P14. Again, if P4 was submitted for the purpose of the loan, there was no reason for PW1 to have filled in the name of Aundre Kok Oon on P14 which name is different from that as stated in P4. The inconsistency, in my view, was inexplicable and one that the plaintiff never cared to explain. It undermined the case for the plaintiff that the second defendant gave his practising certificate to the plaintiff to support the loan application of the first defendant.

[18] This brings us to the evidence of the second defendant. Learned counsel for the plaintiff submitted that the second defendant although denying having not signed P14 did not adduce evidence to that effect. Further, although the second defendant had not so pleaded, by necessary implication, his case was that the signature on P14 was a forgery. Yet we find the second defendant not having lodged any police report which was strange for a senior lawyer like him not to have done.

[19] With respect, I did not agree that the second defendant did not adduce any evidence. In response to PW2's assertion that P14 was executed before him at the office of Wearma Heavy Machinery in Kulai, Johor the second defendant stated in evidence that he had only been to Kulai once and which occasion was to the police station. In addition, he produced evidence that is exh D4 which placed him at the Kuala Lumpur courts attending to cases on 26 August 1997.

A His evidence on this remained unshaken and was the weightier given that even PW2 could not identify him as the person that signed P14 before him in Kulai.

[20] Instead, the plaintiff through PW2 and PW1 was at pains to show that P14 was not signed on the date stipulated on it, that is to say on 26 August 1997, but at some time after P2 had been signed. PW1 had even ventured that it was normal for P2 ('the hire-purchase agreement') to be dated at the time of disbursement of the loan but not on the date of signing. Thus, it would appear that the plaintiff refused to be pinned down to the date of execution stated in the very document they wished the court to rely upon to ascribe liability on the second defendant. This in my opinion was unfair to the second defendant who could not respond to an accusation which was vague. This had caught the second defendant by surprise at the trial when the plaintiff had time enough to amend their pleadings to show that P14 was not dated on the day expressly stated on it. In the result, I was in total agreement with learned counsel for the second defendant that such a ruse by the plaintiff ought to be taken as an adverse inference against the plaintiff's claim that the second defendant had signed P14. The inference is that had such a date of signing been stated, then the second defendant would have been able to refute it by showing to the court that he was attending to court cases away from Kulai and that it would not have been possible for him to have signed P14 before PW2 in Kulai.

[21] As for the censure of the second defendant for not making a police report, in my opinion, under the circumstances this was not as calamitous as the plaintiff made it out to be. Normally, one lodges a police report if a crime has been committed and one wishes for criminal investigations to commence. In our present case, the second defendant found himself in a dispute that was civil in nature where he was sued on guarantee documents that he had allegedly signed. The second defendant gave undisputed evidence that on 30 April 2002, after receiving the notice of demand (at p 22 of bundle B ('agreed bundle')) from the plaintiff's then solicitors, he wrote to the plaintiff requesting that the signature on the guarantee that is P14 be analysed by the expert. However, the plaintiff chose not to do so. It was only in August of 2009 that the plaintiff finally agreed for his handwriting to be analysed by the government chemist. In my opinion, making a police report under the circumstances would hardly serve any purpose. On the contrary, the fact of the second defendant being willing right from the start to subject his handwriting to expert analysis spoke of his sincerity.

[22] The parties spoke of the analysis done by the government chemist. It was not in dispute that after requests made by the second defendant, PW1 eventually gave instructions to send the specimen signatures of the second defendant to the Department of Chemistry Malaysia for comparison with the signature on P14. The document examiner of the department had made the

analysis and her conclusions are condensed in her report of 4 November 2009 that is P12. In P12, the document examiner stated that on comparison, she found the questioned signature on P14 to show differences in handwriting characteristics from the specimen signatures of the second defendant (exhibited at pp 1–4 of bundle B). Hence, she was of the opinion that the questioned signature was most probably not written by the writer of the specimens. In other words, she was of the opinion that the signature of the guarantor on P14 is not that of the second defendant. Thus, the opinion of the document examiner was against the case for the plaintiff that the second defendant signed P14. It instead corroborated the second defendant's case that he did not so sign. It was not surprising therefore, that the plaintiff changed tactic and suggested at the trial that the report of the document examiner was inconclusive. We thereby had learned counsel for the plaintiff submitting that P12 had no probative value. He gave three reasons for saying so.

[23] Firstly, there was the direct evidence from PW2 that the guarantor had signed the guarantee (P14) in front of him. Furthermore, PW2 was positive he never witnessed any signing of any guarantee without the presence of the signatory. Secondly, the second defendant never supplied any contemporaneous document bearing his signature in 1997 for the purpose of the analysis of the disputed signature on P14 by the chemist. All that the second defendant had said in court pertaining to this is that he did not have such contemporaneous documents in view that in 1997 he did not do conveyancing matters that required attestation on his part. Thirdly, the document examiner was not called to testify in court. In light that she made her findings without the contemporaneous signature of the second defendant, the second defendant should have called her to testify before her opinion could be considered or evaluated. In support of this contention, the plaintiff relied on a passage from the judgment of James Foong J (as he then was) in *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200; [2000] 4 CLJ 508 where he said at p 531:

> … I am of the view that though the MPAJ report is admitted as evidence, the findings made therein, as well as the opinions expressed have still to be evaluated. And unless these are tested by the due process of the procedural law ie by examination of witness or witnesses who personally form such opinions or made such findings, then very little weight shall be attached when this court is asked to evaluate them …

[24] On the first point, I have earlier dealt with the so-called direct evidence of PW2 and nothing more need be said concerning it. As already explained, I found the evidence of PW2 that he witnessed the signature of the second defendant on P14 to be totally unfounded and not worthy of belief. The state of the evidence of PW2 being such, it could hardly have any bearing on the probative value of the chemist report.

[25] With regard the second point, in my opinion, it did not lie with the plaintiff to fault the second defendant for not being able to provide the contemporaneous documents bearing his signature in the year 1997. As mentioned earlier, the second defendant after receiving the notice of demand from the plaintiff's then solicitors had as far back as 30 April 2002 written to the plaintiff requesting that the signature on the guarantee that is P14 and his handwriting be compared and analysed. However, the plaintiff chose not to do so when the evidence was the fresher as it were at that time. It was only in August of 2009, which was seven years later that the plaintiff finally agreed for the second defendant's handwriting to be analysed. The present solicitors acting for the plaintiff ie Messrs Shahinuddin & Ranjit had then requested for specimen signatures from him including, apparently, signatures made in 1997. Unfortunately, by the time of that request, 12 years have gone by and in my view, it would have been rather late in the day to be looking for those specimen signatures made in 1997. The second defendant had explained to Mr Shaifful Bahrin himself, of learned counsel for the plaintiff, that he did not have contemporaneous documents bearing his signature as he did not do conveyancing matters requiring attestation on his part in 1997. He did offer a copy of his old passport but that signature too was not made in 1997.

[26] In my opinion, it was the plaintiff that had been indolent and did not seize the opportunity when the second defendant offered to have his handwriting analysed. Furthermore, the second defendant made that offer immediately after receiving the notice of demand from the plaintiff. He could not have acted more expeditiously. At that point in time, the evidence was probably more fresh than it would be seven years down the road. In the circumstances, it was unfair for the plaintiff to insinuate that the second defendant was deliberately withholding evidence by not supplying the contemporaneous signatures.

[27] By the third point raised, learned counsel for the plaintiff contended that the report that is P12 was not conclusive because the document examiner had formed her opinion on the authenticity of the signature on P14 without making comparison with any contemporaneous signature of the second defendant. In so contending, the plaintiff in effect was challenging the truth of the content of P12. Moreover, in making that challenge, the plaintiff, purportedly relying on the above-quoted passage from the judgment in *Steven Phoa Cheng Loon*, required of the second defendant to call the maker of P12 to testify. The case for the plaintiff was that since the second defendant had done no such thing, the truth of the content of P12 remained untested by cross-examination and consequently, no weight could be attached to it.

[28] With respect, I was of the view that the plaintiff's reliance on the judgment in *Steven Phoa Cheng Loon & Ors*, was misplaced. This is because the

facts obtained in that case are different. The commission of inquiry that was set up by MPAJ to investigate the cause of the collapse of the Highland Towers published the report in that case. At the trial, the plaintiff attempted to tender the report as an exhibit but some defendants raised objections on grounds the report attributed faults to certain of the defendants. According to the affected defendants, it was unfair to admit the report as evidence since they were not represented at the inquiry nor given the opportunity to test the validity of the evidence adduced. In the end, the court admitted the document as evidence on the basis that it was a public document but made the above-quoted observations concerning the opinions expressed therein. That document was never an agreed document.

[29] In our present case, the report that is P12 had a different beginning. It was a document commissioned by the plaintiff at the behest of the second defendant. Before the trial, the parties had included the report as part B in the agreed bundle of documents marked as bundle B. By including it as part B, the parties had agreed to dispense with formal proof of the document. Moreover, at the trial, under cross-examination, PW1 admitted she gave instructions for the chemist to make the comparison of the signature on P14 with the signature of the second defendant. She said too that the original report of the chemist was with her, which she produced in court. Learned counsel for the second defendant had then applied to tender the report as exhibit through her. Learned counsel for the plaintiff said he had no objection and that resulted in the report, which was already included in bundle B at pp 24–25, being marked as exh P12. P12 therefore was well and truly an agreed document where formal proof of its execution had been dispensed with.

[30] The Supreme Court had the occasion to consider the evidentiary value of a document in an agreed bundle in *Jaafar Shaari (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [2000] 4 MLJ 200; [1997] 4 CLJ 509. Peh Swee Chin FCJ said at pp 706–707:

> In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.
>
> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties. …

A Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the document including any 'written hearsay' contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal.

B

[31] Thus, in respect of documents marked on admission dispensing with formal proof, the contents are evidence although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents. This precisely was what the plaintiff in the present case did — challenging the truth of the contents of P12, an admitted document where formal proof was dispensed with.

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[32] The question that arose was how should the plaintiff have gone about challenging the truth of the content of P12? Augustine Paul J, as he then was, considered the point in *Mohd Nazari Ab Majit v Tan Keo Hock & Anor* [1999] 1 CLJ 601. He made the following observations at pp 605–606 with which I respectfully agree:

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It is therefore clear that where a document is admitted with formal proof being dispensed with, the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise. I must make it clear that the cross-examination that I have just referred to is cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the document has been dispensed with which means he need not be made available for cross-examination. If he is required to be produced for cross-examination then the object of dispensing with formal proof of the document will be defeated. If cross-examination of the maker is required in order to establish the truth of the contents of the document then the party requiring such cross-examination ought not to have agreed to dispense with formal proof. Where he agrees to dispense with formal proof, the other party is not obliged to produce the maker for cross-examination. In that event the evidentiary value of the document is determined by cross-examination of other witnesses produced by either party or by calling other witnesses on the issue concerned and the circumstances of the case. The reservation of a right to cross-examine when there is agreement to dispense with formal proof of a document is therefore superfluous as it is implicit in such an agreement. In the light of what I have said thus far the dispensation of formal proof of the police report with a right to cross-examination in this case can only refer to cross-examination of other witnesses called by the parties for the purpose of challenging the truth of the contents of the report.

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[33] In our present case, it was the plaintiff that had challenged the truth of the content of the agreed document that is P12. The onus therefore was on the plaintiff to cross-examine the witnesses called for this purpose or adduce evidence otherwise. Instead, we had the plaintiff suggesting that the second defendant should have been the party to do that by calling the maker of P12 to testify. The plaintiff had fallen into error in thinking so as the second defendant was under no such obligation. Besides, the cross-examination of witnesses refer to cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the document has been dispensed with which means the maker need not be made available for cross-examination. It was therefore rather pointless for the plaintiff to attempt to draw any sort of adverse inference against the second defendant for having not called the chemist to testify.

[34] The fact remained that the court at the end of the whole case, had to determine the truth of the content of P12 and the weight to be given to it. As stated in *Jaafar Shaari*, above, in so doing the court must have regard to any challenge by either party or the absence of it on the truth of any part of the document. At the trial, the only challenge that came from the plaintiff was the suggestion that the chemist should have made comparison with the contemporaneous signatures of the second defendant. To effectively make that challenge, the plaintiff should have cross-examined witnesses called for the purpose of challenging the truth of the contents of P12. However, the plaintiff did not call any such witness, side tracked no doubt by the erroneous belief that it should have been the second defendant to call the witness.

[35] What we had at the trial was learned counsel for the plaintiff cross-examining the second defendant on the subject matter. However, the second defendant was not such an expert as to comment on the materiality or significance of comparing the signature on P14 with his contemporaneous signatures rather then his current specimen signatures. Neither was he such an expert to dispute the findings of the chemist in P14. Hence, if there was any cross-examination nothing of significance came out that would amount to credible challenge of the probative value of P12.

[36] It has been said before that an important test to be applied in giving weight to the opinion of expert witnesses is whether the witness is specially skilled in the field of inquiry carried out by him. Hashim Yeop Sani J, as he then was, spoke of such a test in *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 and held (at p 255):

> The opinion of witnesses possessing peculiar skills is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without the assistance of the expert. Thus the opinion of these skilled witnesses is admissible in evidence including where the

A opinions rest on the personal observations of the witnesses themselves and on the facts within their knowledge. To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being possessed of particular knowledge concerning the same. …
B A similar question arose in the case of *R v Silver Lock* [1894] 2 QB 766 at p 771, where handwriting was in issue, and of person to give expert evidence Lord Russell of Kilowen CJ said 'Is he peritus? Is he skilled? Has he an adequate knowledge?' The same test was applied by Suffian LP in *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 where the Lord President said:

C The only question was, is Mr Lum peritus, is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.

D

If a witness is not so skilled the judge will direct that his evidence be disregarded. But once it is determined that his evidence is admissible the rest is merely a question of value or weight which will be that which the court will attach to it as the court believes the witness to be peritus.

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[37] In our present case, the plaintiff in commissioning that the signature in P14 was to be compared with the handwriting of the second defendant, had called upon the government chemist to undertake to form an opinion as to
F whether the second defendant had executed the guarantee that is P14. At that material time, the parties had agreed that the chemist was an expert who could help the court form an opinion as to the identity or genuineness of the handwriting in P14. Indeed, by agreeing to the government chemist to form an opinion as to the genuineness of the handwriting in P14, the plaintiff and the
G second defendant implicitly viewed and accepted the expertise and impartiality of the government chemist in the matter. In any event, the plaintiff had not at any point in time whether before or during the trial suggested that the government chemist was a person that was not skilled in the science of identification of handwriting. Hence, the skill of the government chemist in
H carrying out the handwriting analysis was not in dispute.

[38] Since the parties themselves held out the government chemist to be an expert in determining whether the handwriting on P14 was that of the second defendant's, I had no reason on my part to find otherwise. I accepted that she
I was peritus and so skilled. In her report, she stated that on comparison, she found the questioned signature on P14 to show differences in handwriting characteristics from the specimen signatures of the second defendant. Hence, she was of the opinion that the questioned signature was most probably not written by the writer of the specimens. In other words, she was of the opinion

that the signature of the guarantor in P14 does not belong to the second defendant. In light that the plaintiff had failed to successfully challenge the truth of the content of P12 and there being no dispute that the document examiner from the Department of Chemistry Malaysia was skilled in the science of identifying handwriting, I had no reason not to give weight to the truth of what is stated therein. I therefore accepted the opinion of the document examiner that the signature on P14 was not that of the second defendant's.

[39] Therefore on a balance of probabilities, from all the evidence presented in court, I found that the plaintiff had not come up to proof that the second defendant had signed P14 as guarantor of the hire purchase loan facility that was obtained by the first defendant.

WHETHER THE SECOND DEFENDANT WAS SERVED A DEMAND

[40] This issue can be given short shrift as the second defendant himself in his witness statement stated that the letter at pp 20–21 of bundle B (exh P22) dated 20 March 2002 was a letter of demand from the plaintiff's solicitors at the material time addressed to Aundre Kok Oon. He added that as the spelling of the name was wrong he informed the plaintiff's solicitors of the error by phone. In my view, it was clear that the second defendant had received and was served that letter of demand that is P22 notwithstanding that there was an error in the spelling of the name. If the second defendant had not been served the demand letter, he would not have been in the position to tell the plaintiff's solicitors of the spelling mistake in the name. This tacit admission from the second defendant of having received the demand letter meant it was no longer necessary for the plaintiff to go the extra mile to adduce proof of posting by registered post or acknowledgement of receipt if by hand. I found therefore that the plaintiff had on balance succeeded in proving the service of the notice of demand on the second defendant.

[41] The second defendant argued that since judgment is not obtained against the first defendant, the plaintiff had not shown the court any conclusive evidence in respect of the quantum of damages suffered by the plaintiff. This argument does not hold water because under the guarantee and indemnity agreement (P14), the liability of the guarantor accrued upon written demand. In this case, the notice of demand date 20 March 2002 (P22) was issued and the second defendant by his own evidence admitted to receiving it.

[42] The relevant clause in exh P22 is cl 2. It reads thus:

> I/We agree and declare that my/our liability under this guarantee shall not in anyway be discharged, diminished or affected by the invalidity or unenforceability of the said hire-purchase agreement or
>
> (a) by granting of time or indulgence to the Hirer;
>
> (b) by the effecting of any release of or compromise with the Hirer or any agreement not to sue the Hirer;
>
> (c) by the impairment of any security taken from the Hirer or the failure to realise or enforce such security; …

[43] Clearly then, cl 2 above stipulates that the liability of the guarantor is not discharged or affected in the event the action against the hirer is compromised. It meant that even if no judgment has been entered against the first defendant as hirer, the right or cause of action of the plaintiff under the guarantee is not affected so long as the written demand has been made to the second defendant.

[44] In any event, the plaintiff had through PW3, a senior executive of the plaintiff, adduced evidence of the indebtedness. PW3 produced the hire-purchase loan legacy statement report marked P16, which is the statement of the account of the hire-purchase loan to Low Achee, the hirer. The record showed that the loan of RM248,000 was disbursed on 26 August 1997 and the last payment on the account was on 18 May 1998. As at 7 March 2002 the total arrears on the account was RM39,999 and the balance outstanding stood at RM394,142.34.

[45] Under cross-examination, PW3 said that if the record upon which he based his evidence was wrong he would not know of it. The second defendant jumped at this and argued that by this PW3 had admitted that he could not verify the accuracy of the records of the plaintiff. The second defendant thus argued that the court should be reluctant to accept the claim that the plaintiff suffered the loss as pleaded.

[46] I did not see the reasoning in the argument of the second defendant. To my mind, the mere fact that PW3 would not know if the records were wrong did not mean that the records were wrong. The second defendant did not produce evidence that would show that the records were wrong. Neither did the second defendant put it to PW3 that the records were wrong or that the amount outstanding as at 7 March 2002 was inaccurate. Thus, as far as I was concerned the evidence of PW3 remained and by it, the plaintiff had proved the loss as pleaded.

CONCLUSION

[47] The plaintiff desired the court to give judgment for it against the second defendant for the sum claimed in the writ based on the guarantee and indemnity agreement (P14) that the plaintiff said was signed by the second defendant. By ss 101 and 103 of the Evidence Act 1950, the plaintiff must prove the fact of signing of P14 by the second defendant. As we have seen and for the reasons stated, the plaintiff did not come to proof that the second defendant had signed P14. For that reason, the plaintiff had failed to prove the liability of the second defendant for any indebtedness arising from the provisions of the guarantee and indemnity agreement. Accordingly, the claim of the plaintiff against the second defendant ought to be dismissed and was dismissed with costs.

Claim against the second defendant dismissed with costs.

Reported by Kohila Nesan